(1872) 06 CAL CK 0005

Calcutta High Court

Case No: Regular Appeal No. 168 of 1871

Habonath Dutt Chowdhry		APPELLANT
	Vs	
Srinath Ghose and Others		RESPONDENT

Date of Decision: June 26, 1872

Judgement

Markby, J.

The facts of the case seem to be as follows:--Sonamani, the zemindar, had a decree for rent for a large amount against Srinath and his co-sharers, who held what is called an oust talook in the zamindari, and a sale of the tenure was threatened. Ambika Charan, the agent of Sonamani, and the plaintiff Haronath were each of them desirous to purchase the tenure provided they could make some favorable arrangement for that purpose with Srinath, who had the management of the whole affair, his co-sharers not interfering at all. The arrangement that Ambika. Charan desired was that the decree-holder should have one-half; himself one quarter; and Srinath Ghose one quarter; he and the decree-holder were to find the funds; and the decree-holder and Srinath were to arrange that the biddings should be kept down, Ambika Charan hoped that he had secured this arrangement, and he went to the sale prepared to bid up to Rs. 80,000 and make the deposit. If he could have carried out his plans, he would have got one quarter of the property for Rs. 27,000 which, as the evidence shows, is 13 or 14 years'' purchase. Haronath, however, had before that date gained over Srinath, and made an arrangement with him that, if the property were sold to him for Rs. 40,000 or 45,000, Srinath should have half. This was no doubt, on the face of it, a far less favorable arrangement for Srinath, but for some reasons of his own he accepted it; probably because he could more easily secure Haronath''s co-operation than Ambica Charan''s in his designs to appropriate the whole of the surplus proceeds for himself to the exclusion of his co-sharers. If the property went for more than Rs. 45,000 Srinath''s share was to be settled afterwards. However, as the District Judge say, things did not go so smoothly as was expected. Another person stopped in the Mohalanavis, as he is called, and through

Chandra Kumar (purchaser of 4 annas) commenced an active bidding on his own behalf, and Ambika Charan being altogether excluded from the arrangement, began, as the decree-holder''s agent, to threaten to postpone the sale[2]. The competition of the Mohalanavis was however got rid of by giving him a one quarter share in the sale, and it was obviously impossible at that time, when upwards of Rs. 60,000 had been bid for the property, for Ambika Charan to stop the sale without Srinath''s consent. But Srinath had then made up his mind to hold by Haronath, and stoutly protested against the postponement threatening to appeal to the Court if any attempt was made to postpone; and the property was accordingly knocked down to Haronath for Rs. 64,000. Subsequently the arrangement between Haronath and Srinath turned out to be (when exactly it was made does not appear), that Srinath was to get one quarter of the property, Haronath was to get one-half, for which, as the District Judge calculates, he paid Rs. 24,000, and in some way or other Srinath got into his hands Rs. 25,000 out of the purchase-money, which he appropriated to his own use, not a rupee (as the District Judge finds) going to his co-sharers. (After discussing the evidence, his Lordship proceeded):--It is further said that it is extremely improbable that Srinath would consent to an arrangement by which be got so small a share, and that it would have been better for him to let the property go for what it would fetch. There was however scarcely any real bona fide competition for the property, nor would a sale to the highest bidder have answered Srinath''s purpose, unless the purchaser would assent to Srinath''s plans for getting hold of the purchase-money. As the District Judge points out, it required a good deal of caution to secure to Srinath all the advantages which he desired. Upon the whole, we agree with the District Judge is his finding that Srinath came to terms with the plaintiff, and that the purchase was made by the plaintiff on the understanding that a one-fourth share should be subsequently handed over to Srinath, and that ''Srinath was to aid the sale in his capacity of debtor by refusing to allow postponement if the decree-holder wished to stay the sale, by assisting a postponement if there was danger of other parties becoming purchasers;'' and that Srinath got a one-fourth share as a reward for the service which he performed for the plaintiff by securing to him the property at a low price. The question then arises upon these facts whether the plaintiff can annul the under-tenure and oust the Biparis. The District Judge thinks he can, because he is the real purchaser not-withstanding his arrangement with Srinath: But the District Judge has altogether omitted to consider the question, which is fairly raised in this case by the allegation of the defendants and by the facts found on the evidence, whether this was not against the Biparis a fraudulent transaction. If it was, and the plain-tiff was a party to it, his suit as against the Biparis must be dismissed.

2. Now we take it to be clear that, if a lessor enters into an agree-ment with another person to get rid of his lessee by means of a fictitious sale and to share the profits of the transaction that is a fraud as against the lessee. That would be a far stronger case than that of Nawab Sidhee Nuzur Ally Khan vs. Rajah Oojoodhyaram , where it was held to be gross fraud in a mortgagee to attempt to deprive his mortgagor of his right of redemption by means of a fictitious sale of the property for arrears of revenue. The question therefore

is whether there was such an agreement in this case. Now it is quite true, as pointed out by Mr. Kennedy, that in the case of Nawab Sidhee Nuzur Ally Khan vs. Rajah Oojoodhyaram , there was, when the agreement was made, the deliberate design to create the arrear of revenue in order to get the estate sold, whilst in the present case there was an actual arrear of rent for which a decree had been obtained and execution threatened, before any negotiation took place. But then it is found, and we think rightly found, that Srinath had, if not absolute control over the sale, at least a considerable voice in bringing it on or postponing it. Now we are by no means sure that it is not the duty of a lessor, under such circumstances, to do his utmost to postpone the sale, and so to protect the interests of his lessee; that is certainly what an upright and honest man would do under the circumstances; and it is a rule of English law, which seems to be founded on broad principles of equity; which are applicable here also, that an intermediate landlord is bound to protect his own tenant from all paramount claims; see Graham v. Allsopp 3 Ex., 186. At any rate we cannot doubt that it is a gross fraud in the intermediate landlord to use his influence to urge on a sale for arrears of rent, in order to secure to the purchaser the advantages of each a sale under the Act: the intermediate landlord at the same time bargaining to receive, as a reward for his services, a share in the advantages thereby secured. And if this be a fraud, then to this fraud the plaintiff was a party, and the sale being part of the machinery by which this fraud was effected, we think it ought to be put entirely on one side in considering the question now before us, and that, as between the plaintiff and the Biparis, the plaintiff ought to be considered, not as having the rights of an auction-purchaser under Act VIII of 1865 (B.C.), but only as having the rights of a private purchaser. It seems to us that if we were to give the plaintiff a decree in this suit, we should be making the Collector and the Court instruments in the hands of the parties to carry out a gross fraud upon the Biparis; a fraud in which we regret to observe more than one person was prepared to assist. It was scarcely denied by Mr. Kennedy that if a superior landlord, protected by an ordinary clause for forfeiture in case of non-payment of rent, were to enter into a contrivance with his lessee to get rid of the under-tenants, by putting the forfeiture in force that would be a fraud on the under-tenants, of which the superior landlord could not take advantage. And it seems to us to mate no difference that the right to cancel the under tenures is given by legislative enactment, and that the right is given, not to the superior landlord, bat to the purchaser of the tenure. The fraud in both cases is that of the intermediate tenant, who seeks to destroy his own under-tenants, to which fraud the superior landlord in one case, and the purchaser in the other, has become a party.

3. This being so, the plaintiff''s suit cannot be maintained. The plaintiff cannot take advantage of his own fraud to oust the Biparis, who hold under a valid grant from Srinath and his co-sharers, or their predecessors. It is unnecessary therefore to consider the two points of a more technical character suggested by Mr. Woodroffe,--namely, first, whether the sale having been act aside by the Commissioner it is now in force at all; and, secondly, whether the Deputy Collector of Ferozepore who sold the property was the Collector within whose jurisdiction the lands lay within the meaning of s. 3 of Act VIII of

1865 (B.C.). With regard to the first point, however, we may say that, having heard Mr. Woodroffe''s argument, We are not disposed to give our assent to his contention that an order made by a Commissioner is irrevocable by his successor. No doubt this is a step which every officer would hesitate to take; and which be ought not to take except under very special circumstances; but here Mr. Simson, in cancelling Mr. Backland''s order and confirming the sale, which had been set aside, acted tinder the express directions of the Board of Revenue, and we are not prepared to say either that Mr. Simson should have disobeyed those directions, or that his acts done in obedience thereto were void.

4. Upon the other point which has not been fully argued, we express no opinion.

5. The decree of the district Judge, so far as it relates to the Biparis, must be reversed, and the plaintiff''s suit, as against these defendants, dismissed with costs both in this Court and the Court below. We are asked by Mr. Kennedy to declare the rights of the plaintiff as against Srinath. We think we ought not to do this. Though Srinath has been made a party in this sense that his name has been ordered to be added to the list of defendants, there has been no attempt in the lower Court to deal with the case separately as against him; the plaintiff asked for no relief as against Srinath, and he has nowhere stated what the rights are which he wishes to have declared. Srinath was in this case no more than a witness who volunteered to assist the defendants for his own purposes, and we are wholly at a loss to sec, why the District Judge made him and his co-sharers defendants. We decline to enter into any question as to the rights of the plaintiff as against Srinath Ghose or Ramnarayan Ghose or Gaur Chandra Ghose, the defendants subsequently added; and the proper course will be to order the suit as against them to be dismissed, not on the merits, but on the ground that there is nothing at issue between them and the plaintiff in this suit. These three defendants will bear their own costs.

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[1] Act VIII of 1865 (B.C.), s. 16.--

"The purchaser of an under-tenure sold under this Act shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under tenure, his representatives, or assignees, unless the right of making such incumbrances shall have been expressly Vested in the holder by the written engagement under which the under tenure was created, or by the subsequent written Authority of the person who created it, his representatives, or assignees. Provided that nothing herein contained shall be held to entitle the purchaser to eject khudkasht ryots or resident and hereditary cultivators, nor to cancel bona fide engagements made with such class of ryots of cultivators aforesaid by the rates incumbent of the under tenure or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time each engagements ware contracted by his predecessor. Nothing in this section shall be held to apply to the purchase of a tenure by the previous holder thereof, through whose default the tenure was brought to sale."

[2] (1) Regulation VIII of 1819, s. 14, on acts:--

"First.-- Should the balance claimed by a Zemindar, on account of the rent of any under-tenure, remain unpaid upon the day fixed for the sale of the tenure, the sale shall be made without reserve in the manner provided for in ss. 9 and 10 of this Regulation; nor shall it be stayed or postponed on any account, unless the amount of the demand be lodged. It shall however be competent to any party desirous of contesting the right of the zemindar to make the sale whether on the ground of there having been no balance due, or on any other ground to due the zemindar for the reversal of the name, and upon establishing a sufficient plea, to obtain a decree with fall costs and damages. The purchaser shall be made a [party in such suit, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all lose, at the charge of the zemindar or person at whose suit the sale may have been made.

"Second.--In cases also in which at a, talookdar may contest the zemindar"s demand of any arrear, as specified in the notice advertised, such talookdar shall be competent to apply for summary investigation, at anytime within the period of notice; the zemindar shall then be called upon to furnish his kabuliat and other proofs at the shortest convenient notice, in order that the award may, if possible made before the day appointed for sale. Such award, if so made, will of course regulate the ulterior process; but if the case be still pending the lot shall be called up in its turn, notwithstanding the suit; and if the zemindar or his agent in attendance insist on the demand, the sale shall be made on his responsibility, nor shall it be stayed, or the summary suit be allowed to proceed, unless the amount claimed be lodged in cash, or in Government securities, or in notes of the Bank of Bengal, by the talookdar contesting the demand; and if such deposit be not made, the alleged defaulter will have no remedy, but a regular action for damages and for a reversal of the sale."

And see Krishna Mohan Shaha v. Aflabuddin Mohamed, 8. B.L.R., 134.

By Act VIII of 1865 (B.C.), s. 6.--"If the sum due under the decree, together with interest to date of payment and all costs of process, be paid into Court at any time before the sale commences, whether by the defaulting holder of the under tenure or any one inter acted in the protection of the under-tenure, such sale shall not take place."